



Billing Code: 3410-30-P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 278

RIN 0584-AE22

Supplemental Nutrition Assistance Program: Suspension of SNAP Benefit

Payments to Retailers

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Proposed rule.

SUMMARY: Integrity in the Supplemental Nutrition Assistance Program (SNAP) is a primary Program concern. This proposed rule codifies a provision of the Food, Conservation, and Energy Act of 2008 (FCEA) which authorizes the Department to suspend the payment of redeemed SNAP benefits to certain retail food stores or wholesale food concerns pending administrative action to disqualify the firms for fraudulent activity. In this proposed rule, the Department is also clarifying that, in all trafficking cases, requests for extensions to reply to charges of trafficking shall not be granted and that Freedom of Information requests will be completed separate from the administrative sanction process to prevent retailer-caused delays in the issuance of a final determination. Further, under existing authority in the Food and Nutrition Act of 2008 (hereinafter referred to as “the Act”), the Department is proposing several changes to enhance retailer business integrity requirements.

DATES: Comments must be postmarked on or before [insert date that is 60 days from date of publication in the Federal Register] to be assured of consideration.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- Federal e-Rulemaking Portal: Go to <http://www.regulations.gov>.

Preferred method; follow the online instructions for submitting comments on docket [FNS-2012-0029].

- Mail: Send comments to Shanta Swezy, Chief, Retailer Management and Issuance Branch, USDA, FNS, SNAP, Benefit Redemption Division, 3101 Park Center Drive, Room 426, Alexandria, Virginia 22302.

- All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the Internet via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Shanta Swezy, Chief, Retailer Management and Issuance Branch, USDA, FNS, SNAP, Benefit Redemption Division, 3101 Park Center Drive, Room 426, Alexandria, Virginia 22302; shanta.swezy@fns.usda.gov; or (703) 305-2238.

SUPPLEMENTARY INFORMATION:

Procedural Matters

Executive Order 12866

This proposed rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Impact Analysis

Need for Action

The proposed rule is needed to codify a nondiscretionary SNAP benefit issuance provision as provided in Section 4132 of the FCEA (Pub. L. 110-246), and to further address SNAP-retailer integrity utilizing current authority provided by the Act.

Benefits

Implementing the statutory requirements of Section 4132 of the FCEA will codify a provision in the Food and Nutrition Act of 2008, that improves Program integrity, enhance the Program's ability to appropriately serve those who are truly in need and help to ensure that SNAP benefits are used as intended. While committed to providing vital nutrition assistance to our most vulnerable Americans, protecting taxpayer dollars and ensuring program integrity are equally important. Once final, these regulations will allow the Department to take appropriate action against retailers who are committing SNAP fraud and lack the necessary business integrity to further the purposes of the Program.

Costs

The Department does not anticipate that this provision will have a significant cost impact. The primary costs anticipated are those FNS will bear in relation to updating

systems, retailer-related training materials, and letters to reflect the new regulations, as well as informing State agencies and participating stores of the changes. The costs are expected to be minimal as the changes may be incorporated into planned, regularly scheduled maintenance updates and mailings that already exist to inform participating stores of relevant program changes.

There may be some cost impact on State agencies whose contracted electronic benefit transfer (EBT) systems need enhancement or do not have the functionality necessary to hold SNAP funds. While it is recognized that some costs may be incurred, it is anticipated that FNS will work with State agencies and EBT contractors to keep these costs minimal. In addition, the Department shares in State SNAP administrative costs such as those that may be associated with this rulemaking.

This rulemaking will have no cost impact on most SNAP-authorized firms. SNAP-authorized firms that flagrantly violate Program rules by trafficking in SNAP benefits would be subject to SNAP benefit payment suspension and would ultimately incur a loss of that benefit payment should the final civil, criminal or FNS administrative action result in a sanction for SNAP trafficking. Further, firms that fail to report ownership changes would lose their ability to accept SNAP benefits for six months and SNAP-authorized retailers who allow an unauthorized party to use their SNAP authorization to conduct SNAP business would be subject to a fine for the unauthorized acceptance of SNAP benefits by the unauthorized party.

Though damaging to the Program, the problems being addressed in the proposed rule are limited in scope and FNS has limited data upon which to base an estimate of their frequency or the amount of benefits that might be involved.

Regulatory Flexibility Act

FNS offices, retailers and other firms participating in SNAP, State social service agencies and SNAP clients are the entities affected by this change.

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA) of 1980, (5 U.S.C. 601-612). Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities. This rule will only affect those authorized retailers that violate SNAP rules.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local or tribal governments, in the aggregate or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private

sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

SNAP is listed in the Catalog of Federal Domestic Assistance Programs under 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132, requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121.

Prior Consultation With State Officials

We have presented information regarding all FCEA provisions to State agencies in various forums. Because SNAP is a State administered, Federally-funded program, FNS offices have formal and informal discussions with State officials on an ongoing basis regarding program implementation and policy issues. This arrangement allows State

agencies to provide comments that form the basis for discretionary decisions in SNAP rules. Further, States support Departmental efforts to enhance retailer integrity.

Nature of Concerns and the Need To Issue This Rule

While all parties believe that retailers should not receive payment for fraudulent transactions, not all State EBT contractors may have immediate capability to hold SNAP benefit payments. Comments are being solicited to address this concern.

Extent to Which We Meet Those Concerns

This proposal will solicit comments from State agencies and EBT contractors regarding concerns associated with enacting these changes. The final rule will take these concerns into account and FNS will actively work with State agencies and EBT contractors to achieve compliance with the new provisions.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule will have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. FNS has regularly scheduled quarterly consultation sessions, which act as a venue for collaborative conversations with Tribal officials or their designees. The consultation session for this rule was held on February 29, 2012. The only comment received regarding this regulation at that session was one that expressed general support for SNAP integrity efforts to prevent trafficking.

The Department will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule. Further, the Department is unaware of any current Tribal laws that could be in conflict with the proposed rule and requests that commenters address any concerns in this regard in their responses.

Civil Rights Impact Analysis

The Department has reviewed this rule in accordance with Departmental Regulations 4300–4, “Civil Rights Impact Analysis,” and 1512–1, “Regulatory Decision Making

Requirements.” After a careful review of the rule’s intent and provisions, the Department has determined that this rule will not in any way limit or reduce the ability of protected classes of individuals to receive SNAP benefits on the basis of their race, color, national origin, sex, age, disability, religion or political belief nor will it have a differential impact on minority owned or operated business establishments and women owned or operated business establishments that participate in SNAP.

The regulation affects or may potentially affect the retail food stores and wholesale food concerns that participate in (accept or redeem) SNAP. The only retail food stores and wholesale food concerns that will be directly affected, however, are those firms that violate SNAP rules and regulations. FNS does not collect data from retail food stores or wholesale food concerns regarding any of the protected classes under Title VI of the Civil Rights Act of 1964. As long as a retail food store or wholesale food concern meets the eligibility criteria stipulated in the Act and SNAP regulations, they can participate in SNAP. Also, FNS specifically prohibits retailers and wholesalers that participate in SNAP to engage in actions that discriminate based on race, color, national origin, sex, age, disability, religion or political belief. This proposed rule will not change any requirements related to the eligibility or participation of protected classes or individuals, minority-owned or operated business establishments or women-owned or operated business establishments in SNAP. As a result, this rulemaking will have no differential impact on protected classes of individuals, minority-owned or operated business establishments or women-owned or operated business establishments.

Further, the Department specifically prohibits the State and local government agencies that administer the Program from engaging in actions that discriminate based on

race, color, national origin, gender, age, disability, marital or family status. Regulations at 7 CFR 272.6, specifically state that “State agencies shall not discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin or political beliefs. Discrimination in any aspect of the program administration is prohibited by these regulations, according to the Act. Enforcement may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15.” Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This proposed rule does not contain information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

E-Government Act Compliance

The Food and Nutrition Service is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide

increased opportunities for citizen access to Government information and services, and for other purposes.

Background

The Supplemental Nutrition Assistance Program (SNAP) is the largest program in the domestic hunger safety net. SNAP provides nutrition assistance benefits via electronic debit cards to millions of low income people to supplement their food budgets so they can purchase more healthy food. FNS authorizes eligible retail food stores and wholesale food concerns to accept these benefits as payment for the purchase of eligible food. The compliance of authorized retailers and wholesalers with the rules of the SNAP is essential to program integrity. Unless retail food stores and wholesale food concerns consistently and diligently abide by program requirements, SNAP cannot fully accomplish its objectives and may, in fact, become less effective. The exchange of SNAP benefits for cash, ineligible items or other consideration reduces the value of benefits available for recipients to purchase eligible food items. Thus, in addition to the improper use of Federal funds, the realization of the basic objective of the SNAP, to improve nutrition in the diets of needy families, is undermined.

The Department introduces several proposals in this rulemaking. While it primarily addresses the implementation of Section 4132 of the FCEA, Public Law 110-246, the Department also proposes changes aimed at addressing the business integrity of retailers that are participating in the Program. The business integrity related proposals focus on ownership change reporting, unauthorized redemptions and unpaid debt.

The FCEA Suspension Provision

The FCEA, enacted on June, 18, 2008, renamed and amended the Food and Nutrition Act of 2008, 7 U.S.C 2011 (the Act). This rulemaking addresses the implementation of the provision in Section 4132 of the FCEA that authorizes the Department, in certain cases, to suspend the payment of redeemed SNAP benefits to a suspected retail food store or wholesale food concern pending administrative action to disqualify the firm.

Specifically, the FCEA provision addressed by this rulemaking states that the Secretary, in consultation with the Department's Office of the Inspector General (OIG), may suspend payment of unsettled program funds that have been redeemed if the Department determines that flagrant violations of the Act (including regulations promulgated under the Act) are being committed by a retail food store or wholesale food concern.

The provision further specifies that if the program disqualification is subsequently determined and upheld, these unsettled program benefits may be subject to forfeiture. Conversely, if the program disqualification is not upheld, then the unsettled program benefits will be released to the store with the Department not being liable for any interest on the suspended funds.

A Synopsis of the Proposal

FNS, in this rulemaking, proposes the following procedures for implementing this provision:

A. State EBT contractors will set up their systems to suspend the payment of a firm's unsettled funds when directed to do so by FNS.

B. Affected firms will be notified that payment will continue to be suspended until a determination relative to the sanction action that is underway is finalized.

C. Existing procedures will be followed by FNS for charging the firm and notifying it of its final determination.

D. Existing procedures will also be used for administrative and judicial reviews.

E. Existing procedures guiding criminal or civil actions will be followed.

F. Suspended benefits held while actions are underway will be forfeited to the Department of Treasury if and when the Agency action to sanction firm for trafficking becomes final and/or the civil or criminal action is concluded.

G. Outside of the value of the actual transactions themselves, no interest or credit (for benefits held in suspension or any transactions estimated to have been subsequently lost due to the suspension) will be paid to the firm if it is ultimately determined that the firm is subject to a lesser penalty or no penalty.

Legislative Language Clarification

As stated above, Section 4132 of the FCEA amended the Act. The language in this Provision was inserted into section 12(h) of the amended Act. Section 12(h)(2)(B)(i) deals with the forfeiture of funds. Specifically, this paragraph in the amended Act states that, "...if the program disqualification is upheld, (the suspended benefits) may be subject to forfeiture pursuant to section 15(g)." However, the amended Act does not contain a section 15(g). This is because, in the same revision, section 15(g) was redesignated as section 15(e). Sections 15(d) and 15(e) were stricken from the amended Act since they dealt with paper coupons and, as such, were no longer relevant. Therefore, section 12(h)(2)(B)(i) of the amended Act was intended to refer to section 15(e) and not section

15(g). Section 15(e) under the amended Act authorizes the forfeiture of funds and other items of value inappropriately received in exchange for SNAP benefits.

The Proposed Scope and Parameters of Suspension Activity

In fiscal year 2011, there were a total of 231,465 firms that were authorized to accept SNAP benefits. During that fiscal year, 1,219 of these firms were sanctioned for trafficking and civil or criminal court action was concluded on approximately 5 firms. Trafficking, defined in the regulation at 7 CFR 271.2, is primarily (but not exclusively) the buying or selling of benefits for cash or consideration other than eligible food. Currently, firms that are suspected of trafficking are sent a letter of charges by FNS that specifies the violations or charges that the agency believes constitute a basis for a permanent disqualification. This letter provides the firm with the opportunity to submit to FNS information, an explanation or evidence concerning any alleged instances of noncompliance. The firm is not disqualified until the firm receives a letter advising it of the administrative determination that has been made based on the evidence available to the agency and information submitted by the firm. Until this time, the firm currently retains the ability to remain an active, participating retailer in SNAP and no unsettled program benefits are withheld. Trafficking of SNAP benefits may continue, and in some cases, retailers deliberately delay the FNS determination.

The Department is not proposing to make any changes in the process described above for the vast majority of firms suspected of trafficking. Instead, we are proposing that FNS, in conjunction and coordination with OIG, apply this suspension provision to the firms that are suspected of engaging in flagrant trafficking violations. Limiting the

applicability of this proposal to the most flagrant violators is consistent with the language and intent of the FCEA suspension provision.

FNS will consult with OIG to establish the parameters for initiating suspension activities in a memorandum of agreement to ensure a common understanding and consistent application of the FCEA suspension provision among both agencies of the USDA. In general, suspension of funds under this proposal would be triggered when a firm flagrantly traffics SNAP benefits in significant amounts. In consultation with OIG, FNS will define flagrant violators based on one or more factors, such as SNAP redemption levels, the number of households utilizing SNAP benefits at the location, store inventory, and the SNAP history of the store owners. For example, FNS has encountered situations in which SNAP redemptions at a particular retailer location suddenly and drastically increase in terms of the amount of SNAP redemptions and/or the number of SNAP households conducting business at the store. Generally, such activity has been a clear indication of trafficking. Within a relatively short period of time, these retailers are able to conduct substantial fraudulent SNAP activity, take off with the trafficked benefits, and ultimately appreciate large profits from trafficking activity before FNS and OIG are able to complete a formal investigation. The ability to withhold some revenues from such violators would depreciate their profits and, hopefully, dissuade them from trafficking.

To maintain investigative integrity and security, an exact definition of “flagrant” cannot be provided to the general public. The Department would not wish to provide a target for violators to avoid action. However, it is in the above and similar types of situations that FNS seeks the ability to minimize the extent of the fraudulent activity a

retailer is able to perpetrate by immediately and simultaneously withholding redeemed benefits and initiating an investigation. The ability to suspend funds would apply only to the most egregious of flagrant cases in which the amount of SNAP benefits potentially being diverted from its intended use is substantial. The process for handling any other trafficking case would not change as a result of this provision. Furthermore, FNS will establish checks and balances by requiring consultation with OIG on each case to ensure that there is agreement between both agencies that the retailer has met the established criteria. FNS is particularly interested in obtaining comments from the public on the types of factors and criteria that could prove useful in distinguishing between flagrant cases that would be impacted by this provision and other more routine trafficking cases that would not.

It is also important to note that the “flagrant” violation stipulation in this proposal would only apply to the suspension of unsettled funds. Any firm found to have trafficked under the existing procedures, whether it is considered a “flagrant” violation or not, is still subject to a permanent disqualification as specified in the current regulations at 7 CFR 278.6(e)(1)(i). This proposal has no effect on the applicability of this current administrative action.

The Suspension of the Unsettled Funds

When a firm begins conducting suspicious transactions that fit the parameters of flagrant violations, we are codifying the FCEA provision by proposing that all unsettled benefit redemptions be immediately suspended for that firm. In addition, we are also

proposing that the unsettled funds be subject to forfeiture if the Program disqualification is upheld. The purpose of these proposals is to ensure that a firm does not profit from this illicit activity. This proposal also safeguards the use of Federal funds.

We recognize that there may be some concern regarding the suspension of benefits for a firm that has not yet been found to have trafficked. However, as stated above, the Department anticipates that this provision will affect a relatively small subset of the firms that are charged with trafficking. Therefore, we believe that the benefit of preventing egregious fraudulent payments far outweighs the risk of permitting a firm to possibly profit from trafficking in SNAP benefits until a decision is ultimately made on its case.

The FCEA provision provides that the Department would not be liable for the value of any interest on withdrawn or suspended funds. We are codifying this provision in this proposed rulemaking. In addition, we are also proposing that FNS not be held liable for any lost sales due to funds settlement being suspended under this provision.

Effect on SNAP Recipients

FNS recognizes that there may be some inconvenience to SNAP households when benefit deposits into a firm's bank account are suspended, thereby causing the retailer to cease accepting SNAP payments. As a result, normal shopping patterns, especially for those recipients who are within walking distance of the firm, may need to be altered. However, neither the Act nor the current regulations at 7 CFR 278.6 allow for any accommodation due to potential SNAP customer hardship under such circumstances.

Notification of the Firm

The intent of the FCEA provision to suspend settlement is to prevent violators from continuing to profit by trafficking in Program benefits and to ultimately capture dollars that are the fruits of their trafficking. Therefore, the action to suspend the payment of unsettled accounts must occur immediately. While we recognize that it will not be possible to notify retailers in advance of a suspension action, FNS is proposing to advise firms at the time that they apply to be an authorized retailer of the suspension provision outlined in this proposal. In this manner, firms would be adequately notified of the possibility of this occurring if they conduct transactions that could be considered flagrant violations.

In addition, FNS would issue a notice to the firm as soon as administratively possible to advise the firm as to the reason why the payments have been suspended. The Agency will examine ways on how to provide this notification in an automated and expeditious manner and welcomes public comments in this area.

Lastly, firms already have contact numbers provided by the State EBT contractors to call if there are any issues concerning benefit payments. The EBT contractors will be instructed by States to provide the firm with the contact information for the appropriate FNS office for the firm to contact concerning any action taken as a result of this provision.

Effect on State EBT contractors

The Department is keenly interested on receiving comments from State agencies and EBT contractors regarding necessary system changes, costs, necessary timeline for implementation of the ability to hold unsettled funds, alternative processes for suspending

funds (e.g. redirecting payment to FNS for holding purposes), and any other associated challenges.

Remainder of the Disqualification Process

We are proposing in this rulemaking that once firms have their benefits suspended, the administrative process associated with disqualification would continue as described above and under 7 CFR 278.6, as well as Subparts A and B of 7 CFR Part 279, and the suspension of benefits would remain in effect. Suspension of benefit payments would also remain in effect until any civil or criminal actions are concluded.

The current disqualification process for firms suspected of trafficking includes the issuance of a letter of charges, an examination of the firm's response to the charges, and the issuance of a notice of determination disqualifying the firm (if appropriate). In some cases, retailers deliberately delay the FNS determination by requesting additional time to respond to the charges and/or submitting Freedom of Information Act (FOIA) requests. As such, the Department is taking this opportunity to clarify that, in all trafficking cases, retailer requests to extend the 10-day period, provided in current regulations at 7 CFR 278.6(b)(1), to respond to the letter of charges shall not be granted. The Act provides retailers charged with trafficking or other program violations a full opportunity to present FNS with information through the administrative and judicial review process. In addition, FNS instituted a 10-day retailer response period between the time the letter of charges and the notice of determination are each issued. FNS proposes to maintain this 10-day response period, but to revise language in current 7 CFR 278.6(b) to clarify that a firm's full opportunity to submit information, explanation, or evidence concerning any

instances of noncompliance to FNS is during the administrative review process and not prior to the notice of determination issued by the FNS regional office. Upon the date of receipt of the notice of determination, the action to permanently disqualify the retailer continues to take effect immediately. The retailer then has an additional 10 days to file a written request for an opportunity to submit further information in support of its position through an administrative review or, if appropriate, a judicial review of the original agency action. See current 7 CFR 278.6 and 7 CFR Part 279.

Furthermore, Freedom of Information Act (FOIA) requests will be completed separate from the administrative sanction process. The opportunity to present information prior to a final determination or during the administrative review process should not be considered an opportunity for discovery. Therefore, FOIA requests shall not delay a final determination. Any information the retailer is seeking through FOIA requests may be presented, if necessary, at the judicial review level. Because the Department is merely clarifying its policy through this rulemaking, we are not proposing any regulatory changes regarding FOIA requests.

Business Integrity Provisions

In this rulemaking, the Department is proposing several revisions and additions to the existing regulations to ensure that retailers who are accepting SNAP benefits are furthering the purposes of the Program and have the requisite business integrity to ensure that their firms follow all of the Program rules.

Reporting Changes in Ownership

Applicant retailers sign and certify that they understand and will abide by a myriad of Program requirements. One such requirement is that the SNAP authorization be maintained by the applicant owner or owners, that any changes in ownership be reported to FNS, and that the authorization not be conveyed to a new business owner should the applicant sell the SNAP authorized firm. FNS provides an approved firm with a standard retailer authorization package when a firm is initially authorized to become a SNAP retailer. The authorization letter that is part of this package states, among other things, that the firm is to report to FNS any changes in firm ownership. However, in the course of conducting recent reauthorization and compliance activity, the Department has come across instances in which there were unreported changes of ownership.

In an effort to enhance ownership integrity, the Department is proposing, in 7 CFR 278.1(j) and 7 CFR 278.1(l), to codify this ownership change reporting requirement and authorize FNS to withdraw the SNAP authorization of any firm that timely fails to report changes in ownership within the firm. For purposes of reporting changes in ownership, “timely” would be defined as 10 business days after the occurrence of the change in ownership. This provision would apply to any firm initially authorized subsequent to the implementation date of this provision that fails to report either any additional owner(s) as well as the loss of any owner(s). Also under this provision, any affected owner would not be able to reapply for authorization for a period of six months. All owners involved, including all of those named on the original application, as well as any additional owners, are affected by the six-month timeframe of this provision. Action for failure to report ownership changes would not supersede the Act and companion regulations that provide for penalties associated with falsification of ownership information.

Unauthorized Redemptions

The Department is concerned when an authorized retail establishment is sold or transferred to a different owner, and the selling owner(s) allows the buyer(s) of the store to continue to operate as a SNAP retailer under the selling owner(s)'s authorization. This type of activity is expressly forbidden under the existing regulations at 7 CFR 278.4, 7 CFR 278.6(m) and 7 CFR 278.7(c), which prohibit the acceptance of SNAP benefits by an unauthorized party. Currently, an unauthorized firm that accepts such benefits is subject to an unauthorized redemption fine under 7 CFR 278.6(m). However, there is currently no penalty for the seller in this instance. The buyer cannot accept SNAP transactions without the seller's active knowledge and participation. This is because the buyer would need to use the seller's EBT point-of-sale terminal, and the funds secured from the SNAP purchases would still be settled into either the seller's bank account or into a bank account that the seller is complicit in arranging for the buyer's use. To address the seller's complicit involvement in this area, and as a preventative for unauthorized redemptions, the Department is proposing to make the seller(s) of a store that continues to make unauthorized redemptions subject to two separate penalties. The first penalty, proposed in 7 CFR 278.1(b)(3)(v) and 7 CFR 278.1(k)(3)(vii), would make the seller(s) permanently ineligible for SNAP participation due to lacking the business integrity to further the purposes of the Program. In addition to not being able to be authorized in a new store, the seller(s) would also have the authorization of any another existing participating store in which they have a share of ownership permanently withdrawn. The second penalty, proposed in 7 CFR

278.6(m), would make the seller(s) subject to an unauthorized redemption fine. The amount of the fine would be the same as authorized to be assessed against the buyer.

Unpaid Debt

The current regulations at 7 CFR 278.1(k)(7) allow FNS to deny or withdraw the authorization of any store that fails to pay certain fiscal claims or fines based on a lack of business integrity. The Department proposes to expand this authority by allowing the denial or withdrawal of a store owned by a firm that fails to pay any fine, claim or fiscal penalty assessed against it under Part 278 of the regulations. The denial or withdrawal would be able to be assessed against any store owned by a firm at any time after FNS determines that the debt has become delinquent. The expansion of this authority is being proposed because the Department strongly believes that a firm that is delinquent on any FNS debt lacks the business integrity necessary to remain an authorized retailer. The withdrawal would remain in effect as long as the debt remains unpaid. Once the debt is repaid, the owner(s) may reapply for authorization.

In addition, any administrative review requested as a result of a denial or withdrawal of an unpaid debt will be limited to the existence of, and delinquent nature of, the debt. The initial reason for and the amount of the original debt would not be subject to review at this time as the debtor received those review rights when the initial debt was established.

Establishing Firm Practice to Violate the Program

Current regulations at 7 CFR 278.6(e)(2) and (e)(3) state that a firm is to be disqualified if it has been found to have been the firm's practice to exchange major non-food items for SNAP benefits. Major non-food items, for the purposes of this discussion, are expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages. Under these regulations, the appropriate disqualification time period would be three years if the firm had not been warned that such violations might be occurring or five years if the firm had received prior warning. In either case, firm practice must also be established; if there was no finding that it was the firm's practice, then the appropriate penalty would be a six-month disqualification due to carelessness or poor supervision (7 CFR 278.6(e)(5)).

The Department is taking this opportunity to realign policy with the current regulations. FNS policy states that in instances involving sale of major items by two or more store clerks, firm practice is established if the firm has received prior warning. This proposed rule would clarify that prior warning is not needed to establish firm practice in instances when major ineligible items are sold by two or more clerks and that in such instances, a three year disqualification as prescribed by regulation, would apply.

List of Subjects in 7 CFR Part 278

Banks, Banking, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Surety bonds.

Accordingly, 7 CFR Part 278 is proposed to be amended as follows:

1. The authority citation for 7 CFR Part 278 continues to read as follows:

Authority: 7 U.S.C. 2011-2036

2. In § 278.1:

- a. In paragraph (b)(3) introductory text, place the words “or withdraw” between “shall deny” and “the authorization.”
- b. Redesignate paragraph (b)(3)(vi) as paragraph (b)(3)(vii) and add new paragraph (b)(3)(vi).
- c. Add a new sentence to the end of paragraph (j).
- d. Add new paragraph (k)(3)(vii).
- e. Revise paragraph (k)(7).
- f. Redesignate paragraphs (l)(1)(v) through (l)(1)(vii) as paragraphs (l)(1)(vi) through (l)(1)(viii) and add a new paragraph (l)(1)(v).

The revisions and additions read as follows:

§ 278.1. Approval of retail food stores and wholesale food concerns.

* * * * *

(b) * * *

(3) * * *

(vi) Evidence that an owner(s) or officer(s) of the firm permitted an unauthorized third party to use its POS terminal to conduct SNAP transactions.

* * * * *

(j) * * * In addition, firms are required to report any changes in ownership either of the firm or within the firm to FNS within 10 business days after the change occurs.

(k) * * *

(3) * * *

(vii) Any firm that contains an owner(s) or officer(s) who previously allowed an unauthorized third party to use a POS terminal to conduct SNAP transactions shall be withdrawn and permanently denied.

* * * * *

(7) The firm failed to pay in full any fiscal claim assessed against the firm under 7 CFR Part 278. FNS shall issue a notice to the firm (using any delivery method that provides evidence of delivery) to inform the firm of any authorization denial or withdrawal and advise the firm that it may request a review of that determination. Any review of the determination will be limited to the existence of and delinquent nature of the debt.

(l) * * *

(1) * * *

(v) The privately owned firm failed to report any changes in ownership within the firm to FNS within 10 business days after the occurrence of the change in ownership. The owner(s), officer(s) or manager(s) of such firms shall be withdrawn and shall not be able to submit a new application for authorization in the Program for a minimum period of six months from the effective date of the withdrawal;

* * * * *

3. In § 278.6:

- a. Redesignate paragraphs (b) through (o) as paragraphs (c) through (p) and add a new paragraph (b).
- b. Revise the first sentence and remove the second sentence of redesignated paragraph (c)(1).
- c. Revise redesignated paragraph (f)(2)(i).

- d. Revise redesignated paragraph (f)(3)(i).
- e. Revise redesignated paragraph (m).

The revisions and additions read as follows.

**§ 278.6. Disqualification of retail food stores and wholesale food concerns, and
imposition of civil money penalties in lieu of disqualifications.**

* * * * *

(b) *Suspension of benefit payments.* FNS may have State benefit providers suspend the payment of unsettled Program benefits to a suspected firm pending administrative action to disqualify the firm. This shall apply to those firms that are suspected by FNS, in consultation with the Department's Office of the Inspector General, to have committed flagrant violations of the Food and Nutrition Act of 2008, as amended, or this Part.

(1) Suspension of benefits under this paragraph will remain in effect during the entire sanction process, including during the administrative or judicial review process.

(2) Any firm that has had its unsettled payments suspended under this paragraph shall forfeit those funds if a final determination is made to permanently disqualify the firm. Conversely, the funds shall be released to the firm if a permanent disqualification is not upheld.

(3) FNS shall not be liable for paying either any interest for unsettled payments suspended under this paragraph or compensation for any lost sales due to the authorization being suspended under this paragraph.

(c) * * * (1) *** The FNS regional office shall send any firm considered for disqualification, or imposition of a civil money penalty under paragraph (a) of this

section, or a fine as specified under paragraph (l) or (m) of this section, a letter of charges before making a final administrative determination. * * *

* * * * *

(f) * * *

(2) * * *

(i) It is the firm's practice to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages in exchange for SNAP benefits. It is considered the firm's practice when, based on investigative evidence, the exchanges of these ineligible items for SNAP benefits involved two or more clerks.

* * * * *

(3) * * *

(i) It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations. It is considered the firm's practice when, based on investigative evidence, the exchanges of any ineligible items for SNAP benefits involved two or more clerks.

* * * * *

(m) *Fines for allowing the use of POS equipment by an unauthorized user.* Any firm that allows either a new owner or any other unauthorized user to utilize its POS equipment to conduct SNAP transactions is subject to the same fine that may be assessed against the unauthorized third party that conducts the transactions. The amount of this fine is specified in § 278.6(n).

* * * * *

Audrey Rowe
Administrator
Food and Nutrition Service

February 14, 2013_
Date

[FR Doc. 2013-04037 Filed 02/21/2013 at 8:45 am; Publication Date: 02/22/2013]